Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1448

MARGARET E. GRIGSBY, M.D., *Petitioner*

v.

STERLING DRUG, INC., ET AL., *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The Memorandum and Order of the District Court is annexed to the petition as Appendix 12 through 52. The Judgment of the Court of Appeals (there was no opinion) is also included in Petitioner's appendix 62.

JURISDICTION

Petitioner invokes the jurisdiction of this Court via 28 U.S.C., Sec. 1254(1), erroneously cited by Petitioner as 28 U.S.C., Sec. 1234(1)(sic).

QUESTIONS PRESENTED

Respondent respectfully suggests that questions raised by the Petitioner should more accurately be:

(1) Whether a lower court decision involving the application of a local statute of limitations predicated on undisputed facts raises a Constitutional issue of the type that would warrant the issuance of a Writ of Certiorari?

(2) Can a question be raised for the first time in a Petition for Writ of Certiorari to this Court not having been raised in either of the proceedings below?

STATEMENT OF THE CASE

The statement of the case is set forth in the District Court Memorandum and Order, appendix 1a through 5a.

ARGUMENT

The above case was decided by both the trial court and the appellate court on purely local issues involving the application of the District of Columbia Statute of Limitations, 12 D.C. Code 301 (1973 Ed.) to an essentially undisputed factual matter. The trial court held, and the United States Court of Appeals for the District of Columbia affirmed, that Petitioner's claim for personal injury (loss of hearing allegedly attributable to Petitioner's ingestion of the drug Aralen) was barred because the action was not instituted within three years of the date that the cause accrued.

By Memorandum and Order, attached to and included in Petition as Exhibit 1a-5a, the United States District Judge in this action, in which jurisdiction was invoked on the basis of diversity, considered each of the points raised by and on Petitioner's behalf. The issue was whether she knew, or in the exercise of due diligence should have discovered, that an alleged defect in defendant Respondent's product had caused her injuries, contrary to alleged continuing representations that the product was relatively safe (2a).

Petitioner does not appear to take issue with the legal principle upon which the motion for summary judgment was granted. As noted by the footnote on 3a, counsel for petitioner at oral argument on the motion conceded that there were no facts in addition to those already before the Court bearing on the issue of Petitioner's knowledge or diligence.

The essential facts were that Petitioner noted the onset of her symptoms in August 1968 with a "feeling that her ears were stuffed with cotton" (3a); that after her return to the United States in October 1968, she was referred to and examined by a specialist who concluded that the "most likely cause" of her hearing loss was chloroquine toxicity (Aralen contains chloroquine); that the Physicians' Desk Reference (PDR) for the years 1969 through 1971 referred specifically to some cases of nerve type deafness reported after prolonged therapy with the use of Aralen; that Petitioner did nothing to follow up on the possible relation between the drug and her condition between late 1968 and until suit was filed in 1974 other than consult the PDR's for the appropriate years; that all that was added in 1974 was a report of a particular case similar to Petitioner's; and that Petitioner had not

". . ., in fact discovered any new information which enabled her to bring her lawsuit." (3a)

Under these circumstances, the motion for summary judgment was properly granted and the judgment properly affirmed.

Petitioner raises no constitutional questions other than those basically inherent in any case wherein a summary judgment is rendered predicated upon undisputed facts and the application of local statutes of limitations.

She does raise, for the first time in this proceeding, a question as to whether limitations are tolled during a period that a person is employed outside the country. Even if this were an issue, however, and even if it were a legally recognized exception to the bar of limitations (which it is not and for which no authority has been cited), it avails Petitioner nothing because the undisputed facts disclosed that she was physically present in the United States from October 1968, through the date suit was filed.

She also raises a question, again for the first time, as to whether limitations should have been tolled during a period when the Department of Labor had an option of prosecuting an action on behalf of a government employee who has sustained a work-related compensable injury. This likewise does not avail Petitioner because the Statute involved, 5 U.S.C. 8131, does not purport to create, limit or expand the employee's rights against third party tort feasors, nor does it by any reasonable interpretation expand the employee's rights against third parties if the Secretary is derelict in his duties and fails to investigate or prosecute a third party claim. c.f. *United States* v. *Limbs*, 356 F.Supp. 1004 (D. Ariz. 1973).

CONCLUSION

Since there are no supportable reasons for granting the writ, Respondent respectfully submits that Petition should be denied.

Respectfully submitted,

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